# The Indiana Prosecutor

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## Department of Toxicology Hires New Director

The State Department of Toxicology has a new director. Dr. Michael A. Wagner, Ph.D. joined the Department as Director of the Department on August 1, 2008. Formerly the Assistant Laboratory Director of the New Hampshire Department of Safety Forensic Laboratory and Adjunct Faculty with the Department of Pathology at Dartmouth Medical School, Dr. Wagner is extremely well qualified to serve as Director of the State Department of Toxicology. His previous duties and responsibilities include the administration, operation and implementation of the Toxicology Unit for the New Hampshire Department of Safety Forensic laboratory and its controlled and therapeutic drug testing of biological fluids.

Dr. Wagner has had many opportunities to interact with prosecutors and law enforcement in both case interpretation and research and training. He is an experienced expert witness having testified as "Certifying Scientist" in numerous New Hampshire cases providing testimony in the interpretation of analytical testing protocols and procedures, theory and practice of analytical instrumentation, and pharmacological and toxicological effects of alcohol and drugs on the human system. Additionally, Dr. Wagner has lectured and trained residents, medical students, law enforcement personnel and prosecutors on all aspects of pharmacology and toxicology ranging from drug and alcohol metabolism, drug detection, alcohol detection and interpretation, and analytical techniques. Most notably, Dr. Wagner has participated in training Drug Recognition Experts for state and local law enforcement, emergency medical personnel and judicial personnel.

Significant and important changes are ahead for the Department of Toxicology in the coming months under Dr. Wagner's leadership. Among his top priorities are the improvement of the laboratory functions with the hiring of additional personnel to assist in managing case backlog as well as prioritizing necessary cases to meet critical turnaround times. Another high priority is the replacement of all 210 existing DataMaster breath test instruments in the state with new instruments and training associated breath test operators for local and state agencies. The anticipated goal is to replace all 210 instruments within approximately one year beginning in late spring to early summer of 2009. Dr. Wagner's vision for the State Department of Toxicology, generally speaking, is to make the Department and its laboratory and breath testing programs the best in the country.

The Prosecutor's Mentor Group met Dr. Wagner at their meeting on August 21, 2008. Dr. Wagner exhibits a strong knowledge and grasp of both the scientific and the legal issues and aspects involved in breath, blood, urine and alternate matrices testing as they relate to the detection and prosecution of impaired drivers or untimely deaths. In addition he is able to communicate this knowledge, clearly, articulately and effectively. His qualifications and his knowledge and his strong desire and commitment to work with all of us who are involved in the prosecution of impaired drivers to produce top quality, scientifically sound, legally impeccable work and case support from the State Department of Toxicology are impressive. It is a great pleasure to introduce prosecutors to Dr. Wagner, and we are looking forward to many good things in the future. Prosecutors may contact Dr. Wagner by email at micawagn@iupui.edu or by telephone at (317)274-7825.

### *Inside this Issue*

- *To use the forfeiture by wrongdoing exception to the Confrontation Clause the State must show the defendant intended to prevent the witness from testifying.*

*Giles v. California*, 128 S. Ct. 2678 (2008).

While defense counsel may herald this case as a blow to Domestic Violence prosecutions, the Giles decision is not so straight forward as to support that notion. This decision is much more complex than the simple first blush would recognize. The challenge behind this case is to get judges to thoroughly read the decision rather than simply relying on what a defense counsel might suggest is a bright line solution to a difficult question, "when is forfeiture by wrongdoing applicable?"

To really understand the decision one needs a score card. The Court's opinion is written, as was the other 6th Amendment cases, by Justice Scalia. It is only because of the concurring opinions that the result, to reverse the trial court decision, is reached by a majority vote. The unity on the court is found in the three Justice dissent, written by Justice Breyer and joined by Justice Stevens and Justice Kennedy.

Dwayne Giles, a California native, had a relationship with Brenda Avie which ended poorly. A week prior to her death, Avie called police and reported that Giles had assaulted her. Police officers were summoned to her home where she described the assault in detail. On the day of her death, Avie went to Giles home and they were heard to have a discussion in normal conversational tones. At some point Giles retrieved a gun from the garage and shot Avie six times. Avie was not armed.

> proof of an ongoing domestic violence relationship may be sufficient to establish the proof necessary to invoke the Forfeiture by Wrongdoing exception.

Giles was charged with murder. At trial he claimed that he was acting in self defense and that Avie was the aggressor. Giles characterized Avie as mentally imbalanced and claimed she had threatened to kill him and his new girlfriend. Prosecutor's introduced the statements made by Avie to police officers about the previous incident to rebut Giles self defense claim. They introduced the evidence under California's established Forfeiture by Wrongdoing exception. Giles was convicted of murder and appealed.

On appeal Giles argued that the Forfeiture by Wrongdoing exception applied only when a defendant killed a witness with the intent to keep the witness from testifying. In other wards he did not automatically forfeit his right to confrontation by killing the witness. The State was required to show that he killed Avie for the purpose of keeping her from testifying against him. Under Giles argument, if he killed her for another purpose such as in anger, the State was precluded from using the evidence against him.

The State of California argued that when Giles killed Avie, regardless of his specific intent, the defendant waived his right to confront his accuser in court. Giles conviction was affirmed during the State level appeals process. He sought and was granted certiorari from the U.S. Supreme Court.

Does the defendant waive his Sixth Amendment right simply by killing a witness against him? Justice Scalia, writing for a splintered court, reasoned "no." In a lengthy review of the historical record, Scalia determined that at the making of the Constitution and the 200 years following, Court's required more before invoking the exception. His decision joined by Chief Justice Roberts and in part by Justice Souter and Justice Ginsberg, found that the right to confront one's accuser was so critical it could not be waived without showing the specific intent to prevent a witness from testifying. They remanded the case back to the trial court for re-trial and included a recommendation that the court make a determination whether Giles killed Avie with the intent to prevent her from testifying against him.

Justice Thomas and Justice Alito concurred with the result, that the case should be remanded. Their concurrence gave the Court the necessary votes to reach a majority decision. However, in their opinion, the statements made by Avie to the police were not testimonial and therefore did not implicate the Confrontation Clause. Because California failed to argue the statement was non-testimonial, they could not consider that argument in reaching their decision. They therefore joined with the court in deciding the case required remand.

What is helpful to Domestic Violence prosecutors is Scalia's reference to the proof necessary to show a defendant's intent. The opinion accepts that due to the nature of domestic violence, that its basis is to intimidate and isolate a victim, proof of an ongoing domestic violence relationship may be sufficient to establish the proof necessary to invoke the Forfeiture by Wrongdoing exception. He opined, "Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have



*Continued on page 3*

## U.S. Supreme Court Recent Decisions (continued)

been expected to testify" would all be used by a court in determining the defendant's intent. To further emphasize the point, Justice Souter, in his concurring opinion, wrote "If the evidence for admissibility shows a continuing relationship of this sort, it would make no sense to suggest that the oppressing defendant miraculously abandoned the dynamics of abuse the instant before he killed his victim, say in a fit of anger."

Expert witnesses on domestic violence will be more important with this ruling. However, if a prosecutor can show in a pre-trial hearing that a defendant acted to prevent a witness from testifying, the court can still allow un-crossed testimonial statements to be introduced under the Forfeiture of Wrongdoing exception to the Sixth Amendment.

## Indiana Court of Appeals Recent Decisions

- *6th Amendment right to counsel attached before signing a stipulated polygraph agreement.*

*Caraway v. State*, 891 N.E.2d 122 (Ind. Ct. App. 7/31/2008).

Thomas Caraway was under investigation for Child Molesting in Lawrence County. Two months after taking a statement from Caraway, Detective Captain Herr traveled to Caraway's home to offer him a polygraph test. While standing next to his police vehicle, Herr discussed a polygraph stipulation agreement with Caraway. The agreement did not include a Miranda Warning or notice of a right to Counsel. Caraway agreed to take the test and signed the stipulation agreement.

Three weeks after signing the stipulation agreement, Caraway was transported to the Indiana State Police Post for the polygraph test. Prior to taking the test, Caraway was read his Miranda warnings which included the right to seek assistance of counsel. Caraway was given the polygraph examination. Approximately three months later, Caraway was charged with child molesting as a Class B Felony.

Caraway filed a motion to suppress the polygraph alleging that his 6th Amendment right to counsel was violated when he was not informed of his right to an attorney prior to signing the stipulation agreement. Caraway contended that for a polygraph stipulation agreement to be valid, either Caraway had to have the opportunity to waive his right to counsel or his counsel had to sign the stipulation agreement. His motion was denied and he sought an interlocutory appeal. On Appeal, the State argued that the agreement was valid because Caraway had been notified of his Miranda rights prior to taking the polygraph examination.

The Sixth Amendment right to counsel attaches at a critical stage in criminal proceedings. What defines that exact point has been litigated both Federally and within the State Court appeals process. Recently the U.S. Supreme Court found that the right to counsel attached to a criminal defendant at his initial appearance before a magistrate judge where he is informed of the allegations and where his liberty is subject to restrictions regardless whether a prosecutor has knowledge the hearing is occurring, *Rothgery v. Gillespie County, Texas*, 128 S. Ct. 2578 (2008). In Indiana our Supreme Court has defined a critical stage as the time when a defendant "is confronted with the intricacies of the law or the advocacy of the public prosecutor or prosecuting authorities" *Williams v. State*, 555 N.E. 2d 133 (Ind. 1990).

The Court openly disagreed with a previous Court of Appeals decision, *Kochersperger v. State*, 725 N.E.2d 918 (Ind. Ct. App. 2000), which found that the initiation of a pre-charging polygraph examination did not equate to a critical stage of the proceeding. The Kochersperger court held that the right to counsel could not attach before the initiation of a criminal proceeding. Here, the Court of Appeals found that because the stipulation agreement contained a waiver of evidentiary objections, the signing of the stipulation amounted to a critical stage of the proceeding. Therefore, Caraway had a right to counsel before he consented to the stipulation. Judge Riley wrote in the majority opinion, "When a defendant finds himself in a critical stage, we cannot deny him his right to counsel simply because he has not been formally indicted yet….(I)n addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." The motion to suppress the polygraph report should have been granted.

To avoid a similar outcome, the Indiana Prosecuting Attorneys Council Board of Directors recommends that all prosecutors amend their stipulation agreements to include a Miranda warning. Further it is suggested that prosecutors should instruct their police officers to inform suspects of their Miranda Right's BEFORE presenting an agreement for a stipulated polygraph.

- *Violation of the 6th Amendment when lab report was admitted without testimony from the lab technician who performed the test*

*Jackson v. State*, ____ N.E.2d____ (Ind. Ct. App. 8/12/08).

Defendant, Ricky Jackson, was stopped for driving without his headlights on. During the stop, officers noticed that the interior of Jackson's car smelled of burnt marijuana. A canine search of the vehicle located over twenty-six grams of a


*Continued on page 4*

substance believed to be cocaine. Testing by Kristi Lang of the Indiana State Police Laboratory confirmed the substance was cocaine. She prepared a Certificate of Analysis indicating that the substance tested was cocaine and included the total weight of the drug.

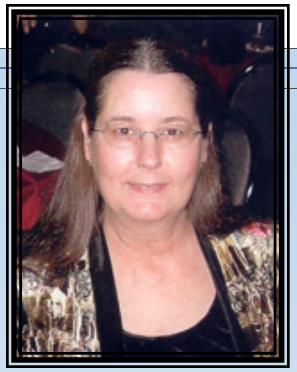
Jackson went to trial on one count of Dealing in Cocaine as a Class A felony. At the time of trial, Kristi Lang was on maternity leave and unavailable for testimony. Her supervisor, Troy Ballard, testified that he had reviewed her work and determined that she had performed the testing properly. The State admitted the Certificate of Analysis into evidence under a Business Records exception to the hearsay rule. Jackson was convicted of Dealing in Cocaine.

On Appeal, Jackson argued that Lang's Certificate of Analysis was testimonial in nature and therefore subject to a 6th Amendment challenge under *Crawford v. Washington*, 541 U.S. 36 (2004). The Court of Appeals found the issue to be one of first impression in Indiana. Reviewing cases from other states, they chose to follow the analysis and holding from a Florida case, *State v. Johnson*, 982 So. 2d 672 (Fla. 2008). In that case, the Florida Supreme Court differentiated between a lab report prepared by a hospital compared to one prepared by a law enforcement crime lab. They concluded that testing conducted within a hospital laboratory is done for medical purposes whereas testing done by a law enforcement lab is performed for the purpose of enabling criminal prosecution. Therefore, when a lab report is prepared by a law enforcement lab, that report contains evidence written to establish the element of a crime and as such is testimonial in nature.

Following the analysis of the Johnson Court, the Indiana Court of Appeals found the Certificate of Analysis was testimonial in nature. Therefore, under Crawford, the only way it could have been admitted was if Lang had testified or had been previously subject to cross examination on the performance of her testing. Since that did not occur, the Court found error in admitting the test results and reversed the conviction.

This opinion will apply only to a criminal trial where there is a 6th amendment right to confrontation. Our Supreme Court in *Reyes v. State*, 868 N.E.2d 438 (Ind. 2007) specifically found that a similar lab report produced in a probation violation hearing is admissible without testimony from the person who completed the testing. In that case the court differentiated the strong right to confrontation in a criminal trial to the reduced constitutional rights that a probationer may retain. In a footnote the Court stated "because probation revocation hearings are not criminal trials, the United States Supreme Court's decision on the Sixth Amendment right to confrontation in criminal trials, *Crawford v. Washington,* 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), is not implicated or discussed here." Therefore, the decision in *Jackson* should have no impact on probation revocation hearings.

The Attorney General's office has indicated they will seek transfer of the Jackson decision.



It is with great sorrow that the Indiana Prosecuting Attorneys Council publicizes the death of Priscilla Jo Beckman. Jo was a deputy prosecuting attorney in the Laporte County Prosecutor's Office for fifteen years and the wife of Rob Beckman, prosecutor and former board chairman. Jo worked mainly in the Child Support division of the office where she served as the division head for nine years.

Rob and Jo were married thirty years when they learned in April she had developed terminal colon cancer. Jo remained at home during her illness while her family provided her care and support. She was able to experience the birth of her first grandchild, Jaden, in May and spent two months watching her grow. Jo died on August 2, 2008.

Our thoughts and prayers are with Rob, their daughter Bethany and son Kevin as they mourn the loss of their wife, mother, and friend.